
HOUSE BILL No. 1116

DIGEST OF INTRODUCED BILL

Citations Affected: IC 29-1-5; IC 29-2-5-1; IC 30-4-2.1; IC 32-17-8.

Synopsis: Various probate and trust matters. Specifies that a will may be executed, attested, and made self-proving by including in the will a self-proving clause signed by the testator and witnesses. Amends the rule against perpetuities to allow for the creation of a perpetual trust. Changes the publication of notice requirements for a court to presume that a person is dead. Establishes rules for interpreting trusts. (The introduced version of this bill was prepared by the probate code study commission).

Effective: July 1, 2003.

Kuzman, Foley

January 7, 2003, read first time and referred to Committee on Judiciary.

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First Regular Session 113th General Assembly (2003)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2002 Regular or Special Session of the General Assembly.

HOUSE BILL No. 1116

A BILL FOR AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 29-1-5-3 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2003]: Sec. 3. (a) ~~The execution of This section~~
3 **applies to a will executed before, on, or after July 1, 2003.** A will,
4 other than a nuncupative will, ~~must~~ **may** be **attested** by the signature
5 of the testator and of at least two (2) witnesses ~~as follows: on one (1)~~
6 **of the following:**

7 **(1) An attestation clause under subsection (b).**

8 **(2) A self-proving clause under section 3.1(c) of this chapter.**

9 **(3) A self-proving clause under section 3.1(d) of this chapter.**

10 **(b) A will may be attested as follows:**

11 (1) The testator, in the presence of two (2) or more attesting
12 witnesses, shall signify to ~~them~~ **the witnesses** that the instrument
13 is the testator's will and either:

14 (A) sign the will;

15 (B) acknowledge the testator's signature already made; or

16 (C) at the testator's direction and in the testator's presence have
17 someone else sign the testator's name.



(2) The attesting witnesses must sign in the presence of the testator and each other.

(b) An attested will may at the time of its execution or at any subsequent date be made self-proved by the acknowledgment of the will by the testator and the verifications of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the testator and witnesses attached or annexed to the will in form and content substantially as follows:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the testator executed the instrument as the testator's will;
 (2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;

(3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;

(5) that the testator was of sound mind when the will was executed; and

(6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, eighteen (18) or more years of age or was a member of the armed forces or of the merchant marine of the United States or its allies:

 Testator

 Date

 Witness

 Witness

(c) Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

(1) The proper execution of a will:

(2) The intentions of a testator:

(3) The mental state or capacity of a testator:

(4) The authenticity of a will:

(5) Matters that are determined by a court to be relevant to the probate of a will:

(d) This subsection applies to all wills, regardless of the date a will is executed. A will is presumed to be self-proved if the will includes an attestation clause signed by the witnesses that indicates that:



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(1) The testator signified that the instrument is the testator's will;
 (2) in the presence of at least two (2) witnesses; the testator signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;

(3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the testator's presence and in the presence of all other witnesses, is executing the instrument as a witness;

(5) the testator was of sound mind when the will was executed; and

(6) the testator is, to the best of the knowledge of each of the witnesses, either:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine of the United States or its allies.

SECTION 2. IC 29-1-5-3.1 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 3.1. (a) This section applies to a will executed before, on, or after July 1, 2003. When a will is executed, the will may be:**

(1) attested; and

(2) made self-proving;

by incorporating into or attaching to the will a self-proving clause that meets the requirements of subsection (c) or (d). If the testator and witnesses sign a self-proving clause that meets the requirements of subsection (c) or (d) at the time the will is executed, an attestation clause signed by the testator and witnesses under section 3(b) of this chapter is not required.

(b) If a will is executed by the signatures of the testator and witnesses on an attestation clause under section 3(b) of this chapter, the will may be made self-proving at a later date by attaching to the will a self-proving clause signed by the testator and witnesses that meets the requirements of subsection (c) or (d).

(c) A self-proving clause must contain the acknowledgment of the will by the testator and the verifications of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the testator and witnesses attached or annexed to the will in form and content substantially as follows:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:



(1) that the testator executed the instrument as the testator's will;

(2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;

(3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;

(5) that the testator was of sound mind when the will was executed; and

(6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

Testator

Date

Witness

Witness

(d) A will is attested and self-proved if the will includes or has attached a clause signed by the testator and the witnesses that indicates that:

(1) the testator signified that the instrument is the testator's will;

(2) in the presence of at least two (2) witnesses, the testator signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;

(3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the testator's presence and in the presence of all other witnesses, is executing the instrument as a witness;

(5) the testator was of sound mind when the will was executed; and

(6) the testator is, to the best of the knowledge of each of the witnesses, either:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine



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of the United States or its allies.

SECTION 3. IC 29-1-5-3.2 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:**

(1) **The proper execution of a will.**

(2) **The intentions of a testator.**

(3) **The mental state or capacity of a testator.**

(4) **The authenticity of a will.**

(5) **Matters that are determined by a court to be relevant to the probate of a will.**

SECTION 4. IC 29-1-5-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 6.** No will in writing, nor any part thereof, except as in this article provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed and attested as required in section 3 **or 3.1** of this chapter. A will can be revoked in part only by the execution of a writing as herein provided. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or, unless, after such revocation, he shall duly republish the previous will.

SECTION 5. IC 29-1-5-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 9.** An instrument creating an inter vivos trust in order to be valid need not be executed as a testamentary instrument pursuant to section 3 **or 3.1** of this chapter, even though such trust instrument reserves to the maker or settlor the power to revoke, or the power to alter or amend, or the power to control investments, or the power to consume the principal, or because it reserves to the maker or settlor any one or more of said powers.

SECTION 6. IC 29-2-5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: **Sec. 1. (a)** When any resident of Indiana is absent from the individual's usual place of residence and gone to parts unknown for a period of five (5) years, without having made any sufficient provision for the care and management of the individual's property, real or personal, and the court having probate jurisdiction in the county where the individual last resided or where the property is situated determines that:

(1) the individual's property is suffering waste for want of proper



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(2) the family of the individual is in need of the use and proceeds of the property for support or education (or that the sale of the property, or part thereof, is necessary for the payment of the individual's debts);

it shall be presumed and taken by the court that the individual is dead. The court has jurisdiction over the estate of the individual in the same manner and to the same extent as if the individual were dead. The court shall appoint an administrator of the individual's estate, who shall have all of the powers and rights over the estate and be subject to all of the liabilities and duties that appertain to administrators of decedents' estates.

(b) Before the court may determine that an individual should be presumed dead, notice to the individual must be published ~~for thirty (30) days~~ **once each week for three (3) consecutive weeks, with the first notice published more than thirty (30) days before the hearing** in a newspaper of general circulation in ~~(+) the county where the individual last resided or where the individual's property is located. and~~ **(2) the state capital.**

(c) The will of an individual who is presumed dead under this section is admissible to probate under IC 29-1 and shall be probated as the will of a deceased individual.

SECTION 7. IC 30-4-2.1 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]:

Chapter 2.1. Rules for Interpretation of Trusts

Sec. 1. In the absence of a contrary intent appearing in the trust, a trust shall be construed in accordance with the rules in this chapter.

Sec. 2. (a) Except as provided in subsection (b), in construing a trust naming as beneficiary a person described by relationship to the settlor or to another, a person adopted before:

(1) the person is twenty-one (21) years of age; and

(2) the death of the settlor;

shall be considered the child of the adopting parent or parents and not the child of the natural or previous adopting parents.

(b) If a natural parent or previous adopting parent marries the adopting parent before the settlor's death, the adopted person shall also be considered the child of the natural or previous adopting parent.

(c) A person adopted by the settlor after the person becomes twenty-one (21) years of age shall be considered the child of the

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1 settlor. However, no other person is entitled to establish the
2 relationship to the settlor through the child.

3 **Sec. 3. A provision in a trust that provides, or has the effect of**
4 **providing, that a beneficiary forfeits a benefit from the trust if the**
5 **beneficiary contests the trust is void.**

6 **Sec. 4. (a) Except as provided in subsection (b) and section 5 of**
7 **this chapter, when a settlor fails to provide in the settlor's trust for**
8 **a child who is:**

9 (1) born or adopted after the making of the settlor's trust; and

10 (2) born before or after the settlor's death;

11 the child is entitled to receive a share in the trust assets. The child's
12 share of the trust assets shall be determined by ascertaining what
13 the child's intestate share would have been under IC 29-1-2-1 if the
14 settlor had died intestate. The child is entitled to receive a share of
15 the trust assets equivalent in value to the intestacy share
16 determined under IC 29-1-2-1.

17 (b) Subsection (a) does not apply to a child of the settlor if:

18 (1) it appears from the trust that the settlor intentionally
19 failed to provide in the settlor's trust for the child; or

20 (2) when the trust was executed:

21 (A) the settlor had at least one (1) child known to the
22 settlor to be living; and

23 (B) the settlor devised substantially all of the settlor's
24 estate to the settlor's surviving spouse.

25 **Sec. 5. (a) Except as provided in subsection (b), if, at the time of**
26 **the making of the trust, the settlor:**

27 (1) believes a child of the settlor to be dead; and

28 (2) fails to provide for the child in the settlor's trust;

29 the child is entitled to receive a share in the trust assets. The child's
30 share of the trust assets shall be determined by ascertaining what
31 the child's intestate share would have been under IC 29-1-2-1 if the
32 settlor had died intestate. The child is entitled to receive a share of
33 the trust assets equivalent in value to the intestacy share
34 determined under IC 29-1-2-1.

35 (b) Subsection (a) does not apply to a child of the settlor if it
36 appears from the trust or from other evidence that the settlor
37 would not have devised anything to the child had the settlor known
38 that the child was alive.

39 **Sec. 6. If a devise of real or personal property, not included in**
40 **the residuary clause of the trust:**

41 (1) is void;

42 (2) is revoked; or



(3) lapses;
the devise becomes a part of the residue and passes to the residuary beneficiary.

Sec. 7. (a) As used in this section, "descendant" includes the following:

(1) A child adopted before the child is twenty-one (21) years of age by:

(A) the settlor; or

(B) the settlor's descendants.

(2) A descendant of a child adopted as set forth in subdivision (1).

(3) A child who is born of the mother out of wedlock in either of the following circumstances:

(A) The mother is a descendant of the settlor.

(B) The mother is the settlor.

(4) If the right of a child born out of wedlock to inherit from the father is or has been established in the manner provided under IC 29-1-2-7, the child, in either of the following circumstances:

(A) The father is a descendant of the settlor.

(B) The father is the settlor.

(5) A descendant of a child born out of wedlock as set forth in subdivisions (3) and (4).

(b) If:

(1) an estate, real or personal, is devised to a descendant of the settlor; and

(2) the beneficiary:

(A) dies during the lifetime of the settlor before or after the execution of the trust; and

(B) leaves a descendant who survives the settlor;

the devise does not lapse, but the property devised vests in the surviving descendant of the beneficiary as if the beneficiary had survived the settlor and died intestate.

Sec. 8. Kindred of the half blood are entitled to receive the same trust interest that they would have received if they had been of the whole blood.

SECTION 8. IC 32-17-8-3, AS ADDED BY P.L.2-2002, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 3. (a) A nonvested property interest is valid if:

(1) when the interest is created, the interest is certain to vest or terminate not later than twenty-one (21) years after the death of an individual then alive; or



(2) the interest either vests or terminates within ninety (90) years after the interest's creation; **or**

(3) the interest is in a trust and:

(A) the trust does not:

(i) require the accumulation of income; and

(ii) suspend the power of alienation;

for longer than specified in subdivision (1) or (2); or

(B) the trust:

(i) does not require the accumulation of income for longer than specified in subdivision (1) or (2); and

(ii) gives the trustee the power to sell trust assets.

(b) A general power of appointment not presently exercisable because of a condition precedent is valid if:

(1) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy not later than twenty-one (21) years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within ninety (90) years after the condition precedent's creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is valid if:

(1) when the power is created, the power is certain to be irrevocably exercised or otherwise to terminate not later than twenty-one (21) years after the death of an individual then alive;

or

(2) the power is irrevocably exercised or otherwise terminates within ninety (90) years after the power's creation; **or**

(3) the power is created in a trust that meets the conditions of subsection (a)(3).

(d) In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

SECTION 9. IC 32-17-8-4, AS ADDED BY P.L.2-2002, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 4. (a) Except as provided in subsections (b) ~~and (c)~~ **through (d)** and in section 1(a) of this chapter, the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this chapter, if there is a person who alone can exercise a power created by a governing instrument to become the

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- 1 unqualified beneficial owner of:
2 (1) a nonvested property interest; or
3 (2) a property interest subject to a power of appointment
4 described in section 3(b) or 3(c) of this chapter;
5 the nonvested property interest or power of appointment is created
6 when the power to become the unqualified beneficial owner terminates.
7 (c) For purposes of this chapter, a nonvested property interest or a
8 power of appointment arising from a transfer of property to a
9 previously funded trust or other existing property arrangement is
10 created when the nonvested property interest or power of appointment
11 in the original contribution was created.
12 **(d) For purposes of this chapter, a vested or nonvested property**
13 **interest or power of appointment arising from the exercise of a**
14 **nongeneral power of appointment is created when the nongeneral**
15 **power of appointment was deemed created.**

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